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Volume 3 | Number 5

Article 1

2-28-1992

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Recommended Citation

Harl, Neil E. (1992) "Eligibility for Medicaid Benefits, the "Assets" Test," *Agricultural Law Digest*: Vol. 3: No. 5, Article 1.
Available at: <http://lib.dr.iastate.edu/aglawdigest/vol3/iss5/1>

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Agricultural Law Digest

Volume 3, No. 5

February 28, 1992

Editor: Robert P. Achenbach, Jr. esq.

Contributing Editor Dr. Neil E. Harl, esq.

ISSN 1051-2780

ELIGIBILITY FOR MEDICAID BENEFITS, THE "ASSETS" TEST

— by Neil E. Harl*

Few topics merit the attention now being focused on health care. While there is major concern about the cost of health insurance and health care costs, many older individuals are deeply concerned about nursing home costs and have seen the estates of friends or relatives reduced sharply by such expenses.

Some are tempted to attempt to plan their estates deliberately to qualify for Title XIX Medicaid benefits for health care.¹ This article discusses briefly the rules governing Title XIX eligibility.²

Tests for Medicaid Assistance

To qualify for Medicaid assistance in a participating state, three tests must be met — (1) the Medicaid applicant must be in a category of persons eligible to participate in the program (the "circumstances" test), (2) the applicant's available income must be less than a prescribed amount to avoid having any of the income used to pay medical expenses (the "income" test) and (3) the applicant's assets must be within specified levels (the "assets" test).

For planning purposes, the assets test is critical and is discussed in the paragraphs following.

Assets test. To qualify for Medicaid, applicants may possess only a limited amount of assets. States set their own asset limits and determine what assets count toward the limit.³ Assets exceeding the limit must be spent down before eligibility can be established for Medicaid.⁴

Initial eligibility determination. At the time of the initial Medicaid eligibility determination, a one-time computation is made of the nonexempt assets of both the institutionalized spouse and the "community" spouse.⁵ The total fair market value of the assets is considered available to the institutionalized spouse for purposes of eligibility.⁶ However, the community spouse is permitted to retain a spousal share of assets worth up to \$60,000.⁷ The community spouse's assets that do not exceed the prescribed amount at the time the institutionalized spouse applies for Medicaid are not considered to be available to the institutionalized spouse for purposes of eligibility.⁸ Thus,

the institutionalized spouse must deplete his or her own spousal share down to the nonexempt asset limit and the community spouse must deplete his or her spousal share down to the spousal share asset limit before the institutionalized spouse can receive Medicaid benefits.

If the total combined value of the assets is such that the spousal share is less than \$12,000, the institutionalized spouse is permitted to transfer assets to the community spouse to allow the community spouse to hold at least \$12,000 in nonexempt assets.⁹ Participating states may, in their discretion, permit transfers allowing the community spouse to hold up to \$60,000 but the community spouse is guaranteed a spousal share valued at only \$12,000.¹⁰

A spousal share equivalent to one half of the total value of the combined assets is also computed.¹¹ During the period of institutionalization and after the month in which the institutionalized spouse becomes eligible for Medicaid, none of the community spouse's assets is deemed available to the institutionalized spouse.¹²

Asset transfers to accomplish eligibility. Any asset owned by an applicant — or an applicant's spouse — that is disposed of within 30 months of an application for SSI is included in the applicant's resources if disposed of to meet SSI eligibility requirements at less than fair market value.¹³ Transfers of nonexempt assets made within the 30-month period are excused from the inclusion rule if a satisfactory showing is made that the applicant intended to dispose of the assets at fair market value or the assets were transferred exclusively for a purpose other than to qualify for medical assistance.¹⁴ A determination that to set aside the transfer would cause undue hardship excuses an otherwise prohibited transfer.¹⁵

Medicaid qualifying trusts. Before 1986, discretionary trusts could be used to isolate trust corpus from beneficiaries to assure Medicaid eligibility.¹⁶ Under the 1986 amendments, amounts included in a Medicaid Qualifying Trust (other than a testamentary trust) are considered available to the maximum extent possible, assuming that the trustee exercises the greatest possible discretion in the beneficiary's favor.¹⁷ That limitation applies, however, only to trusts between an individual and that individual's spouse and does not prohibit discretionary trusts established by a

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child for a parent, a parent for a child or for other persons not in a spousal relationship.

It may be helpful to include provisions in a discretionary trust.

- Stating that the trust's purpose is to provide assistance to the beneficiary in addition to any public assistance benefits including, but not limited to, Medicaid.

- Prohibiting the beneficiary from demanding either the trust corpus or income, leaving distributions to trustee discretion.

- Limiting the amount of trust income disbursed to the beneficiary to an amount less than the applicable income eligibility limit.

- Avoiding limits on the trustee's discretion.¹⁸

Ethical question. A major concern with any effort to qualify deliberately for Medicaid benefits under Title XIX is the ethical aspect. The program was never intended to provide universal benefits to everyone. Even for transfers more than 30 months before making application for benefits, individuals should consider carefully whether they can live with the ethical implications of such moves.

FOOTNOTES

¹ See generally McEowen and Harl, "Estate Planning for the Elderly and Disabled: Organizing the Estate to Qualify for Federal Medical Extended Care Assistance," 24 Ind. L. Rev. 1379 (1991).

² See 42 U.S.C. § 1396.

³ McEowen and Harl, *supra* note 1 at 1403.

⁴ *Id.*

⁵ 42 U.S.C. §§ 1396r-5(c)(1)(A)(i).

⁶ 42 U.S.C. § 1396r-5(c)(2)(A).

⁷ 42 U.S.C. § 1396r-5(f)(2)(A)(ii).

⁸ 42 U.S.C. § 1396r-5(c)(2)(B).

⁹ 42 U.S.C. § 1396r-5(f)(2)(A)(i).

¹⁰ 42 U.S.C. § 1396r-5(f)(1),(2).

¹¹ 42 U.S.C. § 1396r-5(c)(1)(A)(ii).

¹² 42 U.S.C. § 1396r-5(c)(4).

¹³ 42 U.S.C. § 1396p(c)(1)(A).

¹⁴ 42 U.S.C. § 1396p(c)(2)(C).

¹⁵ 42 U.S.C. § 1396p(c)(2)(C),(D).

See, e.g., *Yeates v. D'Elia*, 76 A.D.2d 885, 428 N.Y.S.2d 714

(1980) (sufficient evidence introduced to rebut presumption that transfer of \$4200 in assets within one year of application was for purpose of qualifying for medical assistance.

¹⁶ See *Lineback v. Stout*, 79 N.C. App. 292, 339 S.E.2d 103 (1986).

¹⁷ See 42 U.S.C. § 1396a(k)(1).

¹⁸ See McEowen and Harl, *supra* note 1 at 1420-1421.

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr.

ADVERSE POSSESSION

FENCE. The defendants' land included a portion divided from the plaintiff's land by a fence constructed several feet onto the plaintiff's land. The defendants' predecessor purchased the land in 1944 with the fence already built on its present location and the evidence showed that the fence was in existence until at least 1979. The plaintiff claimed that the predecessor acknowledged in 1961 that the fence was built on the plaintiff's property but the court held that the acknowledgement was ineffective to interrupt the adverse possession where the fence was not moved and the plaintiff was not given possession of the disputed area. **Livingston v. Unopened Succession of Dixon**, 589 So.2d 598 (La. Ct. App. 1991).

ANIMALS

HORSES. The plaintiff, an attorney, was injured when thrown off a horse while taking riding lessons at the defendant's stables. Before taking the lessons, the plaintiff signed a release of the defendant's liability for injuries suffered by the plaintiff during the riding lessons. The plaintiff sought to avoid the release as against public policy and because the defendant stated that the release "didn't mean anything." The court held that there was insufficient public interest or policy in horse riding to make such releases voidable and that the plaintiff's reliance, as an attorney, on a lay person's representation as to the legal effect of the release was unreasonable. **Guido v. Koopman**, 2 Cal. Rptr.2d 437 (Cal. Ct. App. 1991).

BANKRUPTCY

GENERAL

BANKRUPTCY REFORM BILL

The Bankruptcy Reform Bill, S. 1985, has been introduced in the U.S. Senate which would extend the expiration date of Chapter 12 to October 1, 1995; create a temporary small business chapter; make technical and inflation adjustments; and create a National Bankruptcy Review Commission to recommend future changes in bankruptcy law.

AVOIDABLE LIENS. The debtor sought to avoid under Section 522(f) non-possessory, nonpurchase money liens against exempt household goods. The trustee argued that under the Texas exemption statute, Tex. Prop. Code § 42.001(a), encumbered property is not eligible for an exemption; therefore, the liens could not be avoided. The court held that federal law controlled for purposes of determining the avoidance of liens and the liens were avoidable. **In re Kelly**, 133 B.R. 811 (Bankr. N.D. Tex. 1991).

EXEMPTIONS.

AUTOMOBILE. The debtors, husband and wife, filed a joint Chapter 7 case and each claimed a \$4,000 exemption in their jointly owned automobile under N.M. Stat. § 42-10-1. The court held that since each debtor was allowed a separate set of exemptions, the debtors could stack their exemptions in one automobile. **In re Jones**, 134 B.R. 431 (D. N.M. 1991).